STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMAR NIGEL NELUMS,

Defendant-Appellant.

UNPUBLISHED
September 21, 2010

No. 290352
Berrien Circuit Court
LC No. 2008-402980-FC

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, possession of a firearm by a felon, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment without parole on the felony murder conviction, life imprisonment on the armed robbery convictions, three to five years' imprisonment on the felon-in-possession conviction, and two years' imprisonment on the felony-firearm convictions. We affirm.

Defendant first argues that the trial court erroneously admitted other-acts evidence during the trial. We review this unpreserved argument for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Under MRE 404(b), the general rule is that "evidence of other crimes, wrongs, or acts of an individual is inadmissible to prove a propensity to commit such acts." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). On appeal, defendant argues that testimonial evidence that he wanted to discuss drug dealers with police and that he was incarcerated when he made statements to certain witnesses constituted improper other-acts evidence under MRE 404(b). Defendant contends that the testimony allowed the jury to speculate about other criminal acts he had committed. However, the prosecutor did not offer or elicit any testimony regarding any specific acts that concerned drug use or dealing by defendant or that led to defendant's previous incarcerations. Defendant challenges vague and brief references by witnesses, which ultimately amounted to background information relating to the making of the statements. Defendant cites no "acts" that were improperly admitted into evidence at trial, calling into question whether MRE 404(b) is even implicated. The challenged evidence was clearly not offered to show defendant's character or his propensity to commit the crimes for which he was on trial. *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004).

There can be no legitimate argument that the incriminating statements made by defendant were admissible, and the challenged testimony was relevant to showing the context and setting in which the statements were made, allowing the jury to evaluate the credibility of the statements and witnesses with full knowledge of the surrounding circumstances. The more that jurors know about relevant events, the better equipped they are to perform their duties as jurors. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). The principle that a jury is entitled to hear the complete story ordinarily supports the admission of evidence that incidentally touches on the commission of another crime. *Id.* Moreover, defendant elicited testimony from witnesses regarding his incarcerations in an effort to essentially show that the claims by the witnesses, fellow inmates, were not credible, as they were jailhouse snitches who had acquired knowledge of defendant's case through the jailhouse grapevine or other sources and were looking for, or had obtained, plea deals relative to their own prosecutions. Defendant also grilled these witnesses regarding their memories with respect to when they were actually in jail and the circumstances of their imprisonment in an attempt to discredit their testimony implicating defendant. Indeed, in closing argument, defense counsel, after commenting about the great deals that the witnesses obtained for themselves by testifying against defendant, remarked:

> I have to ask one other question, rhetorically. [Defendant] was in prison, he's not stupid. When [the police] first came and talked to him, he had – he was trying to get out of his federal situation. He had information about other people that he wanted to give [police] to help his federal situation.[1] If you believe that [the witnesses] are telling the truth, this has got to be the stupidest man in the world because he knows how the system works. And he knows anybody in prison or in jail are looking for a way out of their situation.

Defendant cannot essentially waive objection to certain testimony by acquiescing to its admission or eliciting it himself in the trial court and then raise it as an error before this Court; to hold otherwise would permit defendant to harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Furthermore, assuming arguendo that the challenged testimony was improperly admitted, we still conclude that defendant failed to establish plain error affecting his substantial rights. We find that in light of the substantial amount of evidence tending to show defendant's guilt, namely the unequivocal identifications of defendant from the surveillance system, the presumed plain error did not result in prejudice to defendant. Moreover, it did not result in the conviction of an innocent defendant, nor did it seriously affect the fairness or integrity of the proceedings. *Carines*, 460 Mich at 763. Lending further support for this holding is the fact that, by stipulation of the parties, the jury was informed of a previous conviction and defendant was actually charged with being a *felon* in possession. In reaching our conclusion, we reject defendant's attempt to avoid plain error analysis by framing this issue in the context of a due process violation. Plain

[1] This reference was to defendant's statement to police that he wanted to talk to them about drug dealers.

error analysis generally applies to both forfeited nonconstitutional error and forfeited constitutional error. *Id.* at 763-764, 774.

Next on appeal, defendant claims that defense counsel rendered ineffective assistance of counsel by failing to file a timely and proper witness list, as well as by failing to investigate the case, interview witnesses, and secure witnesses for trial. Because no *Ginther*[2] hearing was held and no findings were made, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law, which matters are reviewed, respectively, for clear error and de novo. *Id.* In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the basic principles governing a claim of ineffective assistance of counsel, stating:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

All of defendant's arguments relative to this ineffective assistance issue concern witnesses who were not named on a witness list, not secured for trial, or not interviewed. Defendant, however, fails entirely to explain the nature of their expected testimony or how such testimony would have aided the defense, let alone supply affidavits in support. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 6. He has not done so in this case. Nothing in the record supports a finding that the calling of the identified witnesses would have been objectively reasonable. We will not second-guess trial counsel's decision whether to call or question a witness with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant has failed to show that counsel's performance was deficient or that he was prejudiced by any assumed deficiency.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Finally, defendant argues on appeal that his statements to a witness, Terrecho Shurn, were improperly obtained because Shurn had been acting as an informant for the police when the statements were elicited and defendant did not have counsel present, nor was he informed of his *Miranda*[3] rights. This unpreserved allegation of error has absolutely no merit. The record clearly reflects that there was no testimony regarding the nature of any statements made by defendant to Shurn after defendant became a suspect in this case some time in 2003 or thereafter.[4] At trial, Shurn testified regarding defendant's statements made when defendant called Shurn within one or two days after the instant homicide, which occurred on September 17, 2000, statements made when defendant went to Milwaukee two days after the instant homicide, and statements made when defendant bragged about another individual "doing time" for the instant homicide a few months thereafter. Defendant's statements to Shurn during those occasions were admissible as admissions by a party-opponent, MRE 801(d)(2)(A), and did not entail any constitutional violations. Similarly, defendant's statements to two fellow inmates were admissible for the same reasons.

Defendant ends this argument with an additional cursory claim that his statements to others "should have been suppressed as Constitutional violations." However, defendant fails to cite any authority to support that proposition. An appellant may not merely announce his position and leave it to the appellate court to discover and rationalize the basis for his claim, nor may he give only cursory treatment of an issue with little or no citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Defendant does indicate that those witnesses all received some sort of benefit for their testimony, and thus their testimony should have been suppressed. However, the fact that a witness testified pursuant to a deal with the prosecution goes to the weight of the evidence and credibility, not admissibility. MRE 104(e); *People v Edgar*, 113 Mich App 528, 535; 317 NW2d 675 (1982).

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] Defendant's argument appears to be focused on statements made by defendant to Shurn while defendant was incarcerated and Shurn was wearing a wire on behalf of the police. However, during Shurn's testimony and the testimony of a special agent for the FBI in which the wiring incident was mentioned, there was no testimony regarding the nature and specifics of the conversation that was taped between Shurn and defendant. No one testified that defendant implicated himself while being taped.